

No. PD-0907-17

In the Court of Criminal Appeals of Texas

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CHRISTOPHER ERNEST BRAUGHTON, JR.
PETITIONER/DEFENDANT/APPELLANT

v.

THE STATE OF TEXAS,
RESPONDENT/PLAINTIFF/APPELLEE.

On Petition for Review from the First Court of Appeals, No. 01-15-00393-CR

***Amicus Curiae* Brief of the National Rifle Association
of America, Inc.,
in Support of Petition for Review**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
IDENTITY AND INTEREST OF AMICUS.....	1
STATEMENT OF THE CASE	2
STATEMENT REGARDING ORAL ARGUMENT	2
STATEMENT OF PROCEDURAL HISTORY	2
GROUND FOR RELIEF	2
FACTUAL BACKGROUND	3
ARGUMENT..	5
I. The Use of Firearms for Self-Defense is Common and Effective.	6
II. The Decision Below Jeopardizes Public Safety and Fundamental Rights By Affording Inadequate Protection to Those Who Would Use Firearms in Self-Defense.	15
CONCLUSION AND PRAYER FOR RELIEF	18

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Broughton v. State</i> , 522 S.W.3d 714 (Tex. App.—Houston [1st Dist.] 2017, pet. pending)	4
<i>Brooks v. State</i> , 323 S.W.3d 893 (Tex. Crim. App. 2010)	17
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	5, 17
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979).....	17
<i>Moore v. Madigan</i> , 702 F.3d 933 (7th Cir. 2012)	11
<i>Temple v. State</i> , 390 S.W.3d 341 (Tex. Crim. App. 2013).....	17
 <u>Constitutions and Statutes</u>	
U.S. CONST. amend. II.....	5
TEX. CONST. art. I, § 23.....	5
TEX. GOV'T CODE § 411.172(a)(2)	14
 <u>Other</u>	
<i>Active License/Certified Instructor Counts as of December 31, 2016, TEXAS</i> DEPARTMENT OF PUBLIC SAFETY, https://www.dps.texas.gov/rsd/LTC/reports/ActLicAndInstr/ActiveLicandInstr2016.pdf	14
Charles C. Branas, et al., <i>Investigating the link between gun possession and gun assault</i> , 99 AMER. J. PUB. HEALTH 1 (2009)	10, 11
<i>Conviction Rates for Handgun License Holders, Reporting Period: 01/01/2016–12/31/2016</i> , TEXAS DEPARTMENT OF PUBLIC SAFETY, https://www.dps.texas.gov/RSD/LTC/Reports/ConvictionRatesReport2016.pdf	14
David Hemenway & Deborah Azrael, <i>The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey</i> , 15 VIOLENCE & VICTIMS 257 (2000)	6
Don B. Kates & Gary Mauser, <i>Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence</i> , 30 HARV. J. L. & PUB. POL'Y 649 (2007)	8

Eugene Volokh, “ <i>Guns Did Not Protect Those Who Possessed Them from Being Shot in an Assault</i> ,” THE VOLOKH CONSPIRACY (Oct. 5, 2009), http://volokh.com/2009/10/05/guns-did-not-protect-those-who-possessed-them-from-being-shot-in-an-assault/	11
FIREARMS AND VIOLENCE: A CRITICAL REVIEW (Charles F. Wellford, John V. Pepper & Carol V. Petrie, eds. 2005).....	7, 8, 9, 11, 12
GARY KLECK & DON B. KATES, JR., ARMED: NEW PERSPECTIVES ON GUN CONTROL (2001)	6, 7, 10
Gary Kleck & Marc Gertz, <i>Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun</i> , 86 J. CRIM. L. & CRIMINOLOGY 150 (1995).....	9
GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL (2006)	5, 6, 7, 9, 10
H. Sterling Burnett, <i>Texas Concealed Handgun Carriers: Law-Abiding Public Benefactors</i> , NATIONAL CENTER FOR POLICY ANALYSIS (2000), http://www.ncpa.org/pub/ba324	13, 14
NRA-ILA, <i>The Armed Citizen</i> , https://www.nraila.org/gun-laws/armed-citizen/	1
JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS (2d ed. 2008)	12, 13
Lawrence Southwick, Jr., <i>Self-defense with guns: The consequences</i> , 28 J. CRIM. JUST. 3516 (2000)	9
Philip J. Cook, et al., <i>Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective</i> , 56 UCLA L. REV. 1041 (2009)	12
Texas Population Projections Program, TEXAS DEMOGRAPHIC CENTER, http://txsdc.utsa.edu/Data/TPEPP/Projections/Index	14

IDENTITY AND INTEREST OF AMICUS¹

The National Rifle Association of America, Inc. (the “NRA”) is America’s foremost advocate of the Second Amendment, and it is the country’s oldest civil rights organization. Today the NRA has more than five million members, and its educational programs, community service, and advocacy influence many millions more. The NRA is the leading provider of firearms marksmanship and safety training for law enforcement across the county—including in Harris County, Texas.

The NRA has a vital interest in this case. The right to defend oneself and one’s family is a fundamental right that has been recognized repeatedly by the courts as a core component of the right to keep and bear arms and should not be infringed by any branch of government. The NRA’s interest in responsible self-defense is apparent from its blog, “The Armed Citizen,” in which the NRA publicizes instances of responsible gun owners who have defended themselves or others against burglars, robbers, and other violent criminals.² The NRA is also devoted to the practical implications of defending oneself or one’s family.

Accordingly, the NRA has strong interests in this case.

¹ The NRA is solely responsible for paying any fee associated with the preparation of this brief.

² See NRA-ILA, *The Armed Citizen*, <https://www.nraila.org/gun-laws/armed-citizen/> (last visited on September 17, 2017).

STATEMENT OF THE CASE

In this case, a young man who acted to protect his family from a violent attack faces a twenty-year prison sentence for murder. Like millions of Americans do each year, he exercised his fundamental right to bear arms in defense of himself and others. What is at stake in this case is not only his fate, but the fate of countless Texans who will be faced with serious or mortal peril, and who will make a choice between life or death in the shadow of this question: will their justified and therefore lawful use of force be subject to *rational* judgment by their peers? Because the decision below denies that guarantee, it demands immediate and decisive correction.

STATEMENT REGARDING ORAL ARGUMENT

Amicus adopts the Statement Regarding Oral Argument set forth in the Petition, but it does not seek to participate in oral argument.

STATEMENT OF PROCEDURAL HISTORY

Amicus adopts the Statement of Procedural History set forth in the Petition.

GROUND FOR RELIEF

Amicus adopts the Grounds for Relief set forth in the Petition.

FACTUAL BACKGROUND³

On May 24, 2013, the complaining witness, Emmanuel Dominguez, and his fiancée spent the afternoon and early evening at bars and taverns consuming alcohol. After a fight with his fiancée, Dominguez left her alone at a bar and drove home, heavily intoxicated, on his motorcycle.

As Dominguez approached the house that he and his fiancée rented, he encountered the Braughton family in their car. The Braughton family had been to dinner, and petitioner's father, mother, and younger brother were in the car. Revving his engine, Dominguez approached the family car so closely that he set off its proximity alarms.

The motorcycle accelerated and moved to the driver's side of the Braughton car, swerved toward the car, and then moved in front of the car and slammed on its brakes. Mrs. Braughton, terrified by the ongoing events, called her son Christopher, petitioner, who had stayed at home while the rest of the family went to dinner. Mrs. Braughton told her son that they were being chased and that she was scared.

In response, Christopher went to his parents' room and retrieved his 9-milimeter handgun. He loaded the gun and went outside with the gun pointed in a safe direction. When he got outside he saw Dominguez, a retiring Marine, punching

³ The factual background is taken from the April 20, 2017, majority opinion and the dissenting opinion.

his father in the face and “beating him up” while his father—who was unarmed—tried to defend himself. Christopher yelled several times “Stop, I have a gun.” Dominguez responded, “Oh, you have a gun, m_____ f_____. I have a gun for you,” and then reached into the saddlebag on his toppled-over motorcycle. Christopher then “pointed [the gun] towards [Dominguez’s] arm,” without “aiming at a specific area on him,” and pulled the trigger.

Christopher fired only one time, but the shot killed Dominguez. Braughton’s mother called 911 and, with the help of a neighbor, performed CPR. Christopher put the gun inside the house and waited outside for the police, to whom he identified himself as the shooter.

The Harris County District Attorney charged petitioner with murder. He went to trial and was convicted of murder. The First Court of Appeals affirmed the jury’s verdict in a 2-1 decision with Justice Evelyn Keyes issuing a 37-page dissent. On rehearing the Court issued a new opinion but again affirmed the verdict;⁴ Justice Keyes remained in dissent. Petitioner moved for en banc reconsideration, but the Court denied this request. Justice Terry Jennings and Justice Keyes dissented from the denial of the request for en banc reconsideration. All of the opinions issued in this case have been published and thus provide precedent.

⁴ *Braughton v. State*, 522 S.W.3d 714 (Tex. App.—Houston [1st Dist.] 2017, pet. pending).

Christopher Braughton has filed a petition for discretionary review with this Court. *Amicus* offers this brief in support of the Petition.

ARGUMENT

The Constitution of the United States protects “the right of the people to keep and bear Arms,” U.S. CONST. amend. II, and the Texas Constitution guarantees “[e]very citizen . . . the right to keep and bear arms in the lawful defense of himself or the State,” TEX. CONST. art. I, § 23. As the U.S. Supreme Court held in the landmark decision, *District of Columbia v. Heller*, “the *central component*” of this right to bear arms is the individual “right of self-preservation,” the citizen’s natural prerogative “to ‘repel force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’ ” 554 U.S. 570, 595, 599 (2008) (brackets omitted) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *145–46 n.42 (St. George Tucker ed., 1803)). Modern social science shows the wisdom of the protection the Framers enshrined in the fundamental laws they established. Each year, millions of law-abiding American citizens use lawfully possessed firearms to defend themselves, their families, or their homes from a criminal assailant—multiples more, on the best available evidence, than the number of criminals who use firearms for ill. GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 160 (2006). Tens, if not hundreds, of thousands of these law-abiding citizens are Texans, who will be forced to make a life-or-death choice in the

shadow of this State’s legal standards governing justified use of force. By not holding the State to its burden of persuasion on self-defense claims, the decision below affords inadequate protection to these law-abiding citizens and will likely result in an increased loss of life. In light of these stakes, this Court should grant the petition and overturn the decision below.

I. The Use of Firearms for Self-Defense is Common and Effective.

The use of firearms by law-abiding citizens for self-defense is very common and highly effective. The leading study designed to gauge the frequency of defensive gun use (“DGU”) found that every year there are roughly 2.5 million DGUs. KLECK, *TARGETING GUNS*, *supra*, at 150–51 (describing results of the National Self-Defense Survey); *see also* GARY KLECK & DON B. KATES, JR., *ARMED: NEW PERSPECTIVES ON GUN CONTROL* 224–26 (2001).

A few scholars have disputed the frequency of defensive gun use. For instance, gun-control proponent Dr. David Hemenway claims, based on the National Crime Victimization Survey (“NCVS”), that there are only 60,000 to 120,000 DGUs per year. *See* David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey*, 15 *VIOLENCE & VICTIMS* 257, 258 (2000). But that survey was not designed to measure DGUs, and estimates of DGUs based upon it are wholly unsupported by other sources. In contrast, Dr. Kleck’s results, indicating approximately 2.5 million DGUs per year,

are supported by the results of at least 19 other studies, including those conducted or sponsored by organizations such as the federal Centers for Disease Control and Prevention, the Police Foundation, the U.S. Justice Department, and the Washington Post. KLECK & KATES, ARMED, at 228–31. Indeed, Dr. Hemenway *himself served on the board* that designed one of the principal studies that has confirmed Dr. Kleck’s research about the prevalence of DGUs.⁵

The debate over firearms regulation is so ridden with strife that statisticians, criminologists, and public health researchers can sometimes sound less like objective social scientists than zealous advocates. It is important to keep in mind, therefore, that not all articles on firearms regulation are created equal. The most persuasive studies are those conducted by respected, independent groups and that systematically review *the entire body of firearms social science*. We therefore refer this Court to the National Academy of Sciences, established by Congress to provide independent, objective advice to the nation on matters related to science and technology, which has conducted a comprehensive review of the relevant social-science literature “to assess the data and research on firearms.” FIREARMS AND

⁵ *Id.* at 265. The study, the Police Foundation’s National Survey of the Private Ownership of Firearms, found that “1.44% of the adult population had used a gun for protection against a person in the previous year, implying 2.73 million defensive gun users.” KLECK, TARGETING GUNS at 151–52. This figure, like Dr. Kleck’s own lower estimate of 2.2 to 2.5 million incidents of DGU per year, “is probably a conservative estimate . . . [because] cases of [respondents] intentionally withholding reports of genuine DGUs were probably more common than cases of [respondents] falsely reporting incidents that did not occur or that were not genuinely defensive.” *Id.* at 151.

VIOLENCE: A CRITICAL REVIEW 13 (Charles F. Wellford, John V. Pepper & Carol V. Petrie eds. 2005) (“NATIONAL RESEARCH COUNCIL REVIEW”).

The NRC undertook “an assessment of the strengths and limitations of the existing research and data on gun violence.” NATIONAL RESEARCH COUNCIL REVIEW at 1. Its goal was “to raise the science of firearms research so that it can begin to inform public policy.” *Id.* at x. The NRC surveyed *all* the extant literature on firearms regulation—hundreds of books, journal articles, and peer-reviewed studies. *See id.* at 22–31, 78, 130–33, 156–61, 174–77, 186–93, 242–68.⁶ The National Research Council noted that Dr. Kleck’s estimate of defensive gun use from the National Self-Defense Survey (“NSDS”) was much larger than the NCVS estimate preferred by Dr. Hemenway. NATIONAL RESEARCH COUNCIL REVIEW at 103. It went on to note, however, that Dr. Kleck’s results have been replicated and confirmed, whereas Dr. Hemenway’s have not: “*At least 19 other surveys* have resulted in estimated numbers of defensive gun uses that are similar (*i.e.*, statistically indistinguishable) to the results found[] by Kleck and Gertz. *No other surveys have found numbers consistent with the NCVS*” figures used by Dr. Hemenway. *Id.* (emphases added). *See also id.* at 113. And the NRC noted that even the most

⁶ By one count, the NRC reviewed “253 journal articles, 99 books, 43 government publications, and some original empirical research.” *See* Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence*, 30 HARV. J. L. & PUB. POL’Y 649, 654 (2007).

conservative estimates of DGU indicate “hundreds of defensive uses every day.” *Id.* at 102.

Defensive gun uses are not only common, they are also effective. Hundreds of thousands of people each year use firearms in situations in which the defenders claim that they “almost certainly” saved a life by doing so. Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 180 (1995). Numerous studies have also found that robbery victims who resist with firearms are significantly less likely to have their property taken and are also less likely to be injured. KLECK, TARGETING GUNS, *supra*, at 170. “Robbery and assault victims who used a gun to resist were less likely to be attacked or to suffer an injury than those who used any other methods of self-protection or those who did not resist at all.” *Id.* at 171. Similarly, “rape victims using armed resistance were less likely to have the rape attempt completed against them than victims using any other mode of resistance.” *Id.* at 175. Indeed, Justice Department statistics reveal that the probability of serious injury from any kind of attack is 2.5 times greater for women offering no resistance than for women resisting with a gun. Lawrence Southwick, Jr., *Self-defense with guns: The consequences*, 28 J. CRIM. JUST. 351, 362 tbl.6 (2000).

In fact, to prevent completion of a crime, it is usually necessary only for the intended victim to display the firearm rather than pull the trigger. The National Self-

Defense Survey found that defenders actually fired their firearm in only 24% of DGUs, and only 8% of respondents reported wounding their attacker. KLECK & KATES, *ARMED*, *supra*, at 317–18. Indeed, according to survey data, 43% of violent criminals report that they have in at least one instance during their careers decided not to commit a crime as intended because they believed the victim was armed. KLECK, *TARGETING GUNS*, *supra*, at 180. Fewer than one in a thousand defensive gun uses results in a criminal being killed. *Id.* at 178.

While some anti-gun commentators suggest that the possession of self-defense arms does more harm than good because criminals can forcibly disarm their victims and use their own firearms against them, data from the U.S. Bureau of Justice Statistics indicate that, in confrontations with criminals, 99% of victims maintain control of their firearms. KLECK, *TARGETING GUNS*, *supra*, at 168–69. And even the 1% of DGUs that result in criminals taking firearms away from defenders is probably an overestimate, because it includes, for example, instances where a burglar leaving a home with a victim's weapon is confronted by the victim wielding a second firearm. *Id.* at 169. Furthermore, fewer than “1-in-90,000” attempts at defensive gun use result in a householder shooting a family member mistaken for a criminal. *Id.* at 168.

Of course, some dispute the efficacy of defensive gun use. For example, a 2009 study by Charles Branas and his co-authors argued that individuals who

possessed firearms were “more likely to be shot in an assault than those not in possession.” Charles C. Branas, et al., *Investigating the link between gun possession and gun assault*, 99 AMER. J. PUB. HEALTH 1, 4 (2009). The Branas study, however, like others of its ilk, merely found that there was an *association* between victim gun possession and being shot, not that there was a *causal link*. *See id.* at 4–5. Regardless of the effectiveness of defensive gun use, one would expect a positive association between victim gun possession and victim injury, because those people most at risk of victimization (because, for example, they reside in a dangerous neighborhood) are also the *most likely to arm themselves for protection*.

By way of analogy, we don’t suggest that pacemakers cause heart attacks, or don’t protect against heart attacks, just because we find a correlation between the presence of pacemaker and the incidence of heart attacks. Obviously, people might get pacemakers precisely because they’re at risk of heart attacks. Well, people might get guns precisely because they’re at risk of attack.

Eugene Volokh, “*Guns Did Not Protect Those Who Possessed Them from Being Shot in an Assault*”, THE VOLOKH CONSPIRACY (Oct. 5, 2009), <http://volokh.com/2009/10/05/guns-did-not-protect-those-who-possessed-them-from-being-shot-in-an-assault/>; *see also Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (criticizing the Branas and similar studies on this ground).

There are also some studies purporting to link high rates of gun ownership with high rates of home homicide. Here, too, even if statistical *associations* between gun ownership and homicide may exist, no *causal link* has been demonstrated.

NATIONAL RESEARCH COUNCIL REVIEW at 5. Moreover, this body of research was reviewed by the National Research Council and dismissed as proving nothing. The NRC committee identified three fatal flaws in this research: First, “these studies do not adequately address the problem of self-selection. Second, these studies must rely on proxy measures of ownership that are certain to create biases of unknown magnitude and direction. Third, . . . there is no way of knowing whether the homicides or suicides occurred in the same areas in which the firearms are owned.” *Id.* at 6. Therefore, the studies “do not credibly demonstrate a causal relationship between the ownership of firearms and the causes or prevention of criminal violence or suicide.” *Id.*

Others posit that private possession of firearms for self-defense may lead to an increase in injuries because it could initiate a sort of arms race whereby criminals are more motivated to carry guns by the anticipation that their victims may be armed. *See, e.g.,* Philip J. Cook, et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1081 (2009). This speculation is based on surveys interviewing criminals about their thoughts on firearms. A look at the underlying survey research refutes the argument.

Far from concluding that armed victims motivated criminals to carry guns, the study in question actually demonstrated that criminals were *deterred* by the prospect of facing armed resistance. *See* JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND

CONSIDERED DANGEROUS 155 tbl.7.5 (2d ed. 2008) (40% of the criminals surveyed said they had on at least one occasion decided not to commit a crime because they knew or believed the victim was carrying a gun; 69% said they knew a crook who had been “scared off, shot at, wounded, captured, or killed by an armed victim”); *id.* at 146 tbl.7.1 (58% of felons surveyed agreed or strongly agreed that “[a] store owner who is known to keep a gun on the premises is not going to get robbed very often,” and 56% agreed or strongly agreed that “[a] criminal is not going to mess around with a victim he knows is armed with a gun”). And the likelihood that their intended victim might be armed was merely one of nine reasons that, according to a majority of the criminals surveyed, played a significant role in the criminals’ decision to carry guns themselves. *See id.* at 128.

All told, then, there is substantial empirical support for the conclusion that law-abiding citizens who exercise their right to keep and bear arms for self-defense are quite often able successfully to defend themselves, their family, or their property from criminal attack—yielding a substantial public safety benefit.

What is more, the individuals most likely to avail themselves of the benefits of armed self-defense are an overwhelmingly law-abiding group. Researchers have found that “concealed carry licensees [in Texas] had arrest rates far lower than the general population for every category of crime.” H. Sterling Burnett, *Texas Concealed Handgun Carriers: Law-Abiding Public Benefactors* 1, NATIONAL

CENTER FOR POLICY ANALYSIS (2000), <http://www.ncpa.org/pub/ba324>. Indeed, in 2016, carry licensees in Texas were approximately *17 times* less likely to be convicted of a crime than the average Texan. Of the 42,797 convictions of individuals aged 21 and older in Texas in 2016, only 148 (less than 0.35%) of the convictions were of handgun license holders. *Conviction Rates for Handgun License Holders, Reporting Period: 01/01/2016–12/31/2016*, TEXAS DEPARTMENT OF PUBLIC SAFETY, <https://www.dps.texas.gov/RSD/LTC/Reports/ConvictionRatesReport2016.pdf>. By contrast, in that year, handgun license holders represented over 4% of Texas’s *total* population, and approximately 6% of individuals aged 21 and older.⁷

It follows that this group will be more sensitive to changes in the rules that govern their conduct. In order to continue to reap the public safety benefit of successful self-defense, therefore, it is important to ensure that these law-abiding individuals continue to operate under the auspices of a law that adequately protects their right of self-defense.

⁷ See *Active License/Certified Instructor Counts as of December 31, 2016*, TEXAS DEPARTMENT OF PUBLIC SAFETY, <https://www.dps.texas.gov/rsd/LTC/reports/ActLicAndInstr/ActiveLicandInstr2016.pdf> (1,150,745 active license holders); *Texas Population Projections Program*, TEXAS DEMOGRAPHIC CENTER, <http://txsdc.utsa.edu/Data/TPEPP/Projections/Index> (projecting 26,438,031 as the population of Texas in 2016). In Texas, one generally must be at least 21 years of age to obtain a license, TEX. GOV’T CODE § 411.172(a)(2), meaning that the vast majority of the 1,150,745 active license holders are presumptively greater than 21 years of age, whereas only approximately 18 million of Texas’s total population is over 21.

II. The Decision Below Jeopardizes Public Safety and Fundamental Rights By Affording Inadequate Protection to Those Who Would Use Firearms in Self-Defense.

The stakes of this case are high because the rule of law reflected in the decision below does not adequately protect the fundamental right of self-defense. In fact, it affirmatively disadvantages self-defense by holding the State to a less demanding standard of review when it comes to carrying its burden of persuasion that the use of force was unjustified.

A simple review of the facts of this case shows what a massive impact the standard of review can have. Had the court below applied a standard of review that demanded *some* evidentiary support for a jury verdict that rejects a claim of self-defense, Christopher Braughton would be a free man. There is no credible evidence that directly *contradicts* his and other eye witness's accounts of his deadly confrontation with Emmanuel Dominguez: that Christopher shot a man who, after beating Christopher's father bloody, overpowering him, and making a vulgar verbal threat, appeared to be drawing a gun, presenting an imminent mortal threat to Christopher and his family. At most, the evidence merely *permits* a court to *speculate* that events might have unfolded differently.

It is theoretically possible that Christopher never received a panicked phone call from his mother, describing the threatening conduct in which the uncontradicted record shows the decedent engaged immediately prior to assaulting Christopher's

father. Appx33. *It is theoretically possible that* Christopher should have realized that his father, lying bloody on the ground at the feet of an intoxicated 27-year-old Marine, had not yet been severely injured. Appx33–34. These inferences, which rely on the *absence* of evidence, do nothing to cast doubt on the reasonableness of Christopher’s belief that Dominguez was about to draw a gun at the time of the shooting, given that Dominguez had just threatened to do so and was reaching into a saddlebag on his motorcycle. Appx63–64. But *it is theoretically possible that*—contrary to the account of every other eye witness—the girl who watched the confrontation from a second-story window, through a solar screen that blocked 90% of visible light at 10 o’clock at night, and whose trial testimony contradicted her own statement to the police at the scene, Appx88–89, was correct that Dominguez was instead backing away from Christopher when Christopher shot him. Appx36. True, the forensic evidence is inconsistent with any account that has Dominguez facing Christopher at the time of the shooting. Appx87–88. But *it is theoretically possible that* Dominguez just happened to turn and tilt his body at the precise moment of the shooting so that the bullet followed the trajectory it would have followed had he, consistent with the accounts of all direct eye witnesses, been reaching across his body to pull something from the open saddle bag of his motorcycle. Appx38. It’s not physically impossible, just highly implausible.

In no other context can mere speculation of this sort support a guilty verdict. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). But lacking critical guidance about the correct standard of review to apply to claims of self-defense and defense of others in the wake of *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010), the appellate court resorted to speculation. Under any standard of review, the decision below abdicates the appellate court's role of protecting citizens against irrational verdicts. Arising as it does in a self-defense case, the precedent it creates jeopardizes not only due process, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), but also the fundamental right of self-defense enshrined in the constitutions of the United States and Texas.

Unsurprisingly, the court's legal transgression has practical consequences: by making law-abiding citizens less secure that their use of defensive force will be deemed justified, it discourages acts of self-defense and defense of others. When, as is so often the case, "the intervention of society . . . [comes] too late to prevent an injury," *Heller*, 554 U.S. at 595 (quotation marks omitted), the hesitation Christopher's conviction engenders may well cost innocent lives.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the NRA respectfully requests that this Court grant the Petition and reverse the decision of the First Court of Appeals from Houston.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i) because it contains 3,943 words, excluding parts and words as allowed by Tex. R. App. P. 9.4(i)(1).
2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.
3. Dated: October 2, 2017.

/s/ Brady Wyatt
Brady Wyatt

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2017, a true and correct copy of the foregoing *Amicus Curiae* Brief in Support of Petition for Review has been served on all counsel of record by electronic service as all parties are registered users.

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